

H.R. 4167 FACTS

THE SCOPE OF H.R. 4167 IS BROADER THAN ADVERTISED

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During the debate on H.R. 4167, proponents of the legislation portrayed the bill as limited to standardizing food warning labels. For instance, a leading congressional supporter of the legislation stated during the floor debate, “what this deals with is labeling.”¹ Additionally, industry trade associations have emphasized the effect of the legislation on food labels. For example, the Grocery Manufacturers Association has highlighted an argument that H.R. 4167 will “help consumers make educated decisions for themselves and their families in an ever-changing and currently confusing food labeling environment.”²

In fact, the scope of this legislation is much broader than advertised. It applies to state food safety standards, as well as reaching consumer information requirements that extend beyond labeling.

H.R. 4167 APPLIES TO A HOST OF IMPORTANT SAFETY STANDARDS AND OTHER STATE AUTHORITIES

Section 403 A of the Federal Food Drug and Cosmetic Act (FFDCA) lists areas of the law in which the state and local governments cannot act because they are preempted by federal government.³ Section 2 of H.R. 4167 would amend this section of the FFDCA by adding a long list of new areas in which state and local governments can no longer act.⁴ These new areas of federal preemption are listed below.

Adulterated Food. Under H.R. 4167 state and local governments will no longer be able to take action against food that is “adulterated” because it contains “any poisonous or deleterious substance” unless the state definition of what makes a food adulterated is the same as the federal definition.⁵

Emergency Permit Control. Under H.R. 4167 state and local governments will no longer be able to take the following emergency actions, unless they are acting

¹ Statement of Rep. Nathan Deal, Congressional Record, H537 (Mar. 2, 2006).

² Letter from C. Manly Molpus, President and CEO, Grocery Manufacturers Association, to U.S. Representatives (Feb. 22, 2006).

³ Federal Food, Drug, and Cosmetic Act (hereinafter “FFDCA”) (online at <http://www.fda.gov/opacom/laws/fdcact/fdcact4.htm>).

⁴ Sec. 2, H.R. 4167 (establishing a new paragraph (6) in section 403 A(a) of the FFDCA).

⁵ Sec. 402(a)(1),(2),(6), and (7), and 402(c), FFDCA.

pursuant to state requirements and procedures that are identical to the federal requirements and procedures:

- Establish permit controls for any class of food that may be injurious to health by reason of contamination with micro-organisms during the manufacture, processing, or packing thereof;⁶
- Suspend an emergency permit control immediately if the conditions of the permit have been violated; and,⁷
- Obtain access to any factory or establishment of an emergency permit control holder, for the purpose of ascertaining whether or not the conditions of the permit are being complied with.⁸

Poisonous Ingredients in Food. Under H.R. 4167, state and local governments will no longer be able to promulgate regulations limiting the quantity of “poisonous or deleterious substances” added to food even if necessary for the protection of public health, unless their laws are identical to those at the federal level.⁹

Unsafe Food Additives. Under H.R. 4167, state and local governments will no longer be able to prescribe the conditions under which food additives may be safely used, unless their actions are taken pursuant to a state requirement that is identical to a federal requirement.¹⁰

New Animal Drugs. Under H.R. 4167, state and local governments will no longer be able to ensure the safety of new animal drugs or an animal feed bearing or containing a new animal drug, unless their actions are taken pursuant to a state requirement that is identical to a federal requirement.¹¹

Color Additives. Under H.R. 4167, state and local governments will no longer be able to ensure the safety of color additives in food, unless their actions are taken pursuant to a state requirement that is identical to a federal requirement.¹²

H.R. 4167 APPEARS TO PREEMPT STATE PROCEDURAL LAWS

The provisions identified above contain procedural requirements as well as substantive requirements. The Florida Department of Agriculture and Consumer Services, which opposes the legislation, has written:

⁶ Sec. 404(a), FFDCA.

⁷ Sec. 404 (b), FFDCA.

⁸ Sec. 404 (c), FFDCA.

⁹ Sec. 406, FFDCA.

¹⁰ Sec. 409, FFDCA.

¹¹ Sec. 512, FFDCA.

¹² Sec. 721(a), FFDCA.

Sections 404, 406, 409 and 512 of the proposed legislation set forth procedures to be followed, not merely standards. The procedures under State law would presumably have to be identical.¹³

For this reason, Florida is concerned that it could lose its flexible “stop-sale” authority which has been an important tool in protecting public health by allowing the state to immediately act to prevent contaminated food from reaching consumers. Florida could be forced to adopt the more cumbersome federal approach that requires obtaining a court injunction – a process Florida describes as “much more time consuming and expensive.”¹⁴ Florida has stated its concerns that H.R. 4167 could impact its “ability to immediately respond to domestic security threats.”¹⁵

It is unknown how many other state procedural laws could be impacted.

H.R. 4167 APPLIES TO “NOTIFICATION REQUIREMENTS,” NOT JUST LABELS

Section 2 of H.R. 4167, if enacted, would establish a new section 403B of the Federal Food Drug and Cosmetic Act. This section prohibits state and local governments from “directly or indirectly” establishing or continuing in effect “under any authority any notification requirement for a food that provides for a warning concerning the safety of the food, or any component or package of the food,” unless it is identical to a federal requirement.¹⁶

Contrary to the many recent assertions that H.R. would simply impact food labeling, the scope of Section 2 extends well beyond just labels applied directly to food products themselves. H.R. 4167 specifically defines a “notification requirement” to include “a label, labeling, poster, public notice, advertising, or any other means of communication.”¹⁷

Additionally, it is unclear whether H.R. 4167 could prevent a state from directly issuing its own advisories about health risks associated with foods. Although a proponent of the legislation argued on the House floor that the legislation “does not affect a State’s ability to issue its own notification to the public,”¹⁸ this authority is not expressly protected. The provision constraining limitations on state authority in H.R. 4167 only protects a state’s authority to issue notifications that are identical to federal requirements.¹⁹ Additionally, the only consumer advisories that would be

¹³ Letter from Charles H. Bronson, Commissioner of Agriculture, Florida Department of Agriculture and Consumer Services, to Members of the Florida congressional delegation (Feb. 14, 2006) (online at http://www.house.gov/waxman/pdfs/food_safety_fl_agr.pdf).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Sec. 2, H.R. 4167 (establishing a new section 403B(a)(1) of the FFDCA).

¹⁷ Sec. 2, H.R. 4167 (establishing a new section 403B(a)(2)(A) of the FFDCA).

¹⁸ Statement of Rep. Nathan Deal, Congressional Record, H530 (Mar. 2, 2006).

¹⁹ Sec. 2, H.R. 4167 (establishing a new section 403B(a)(3) of the FFDCA).

specifically protected from preemption would be those relating to “sanitation” or to describing the risks of foodborne illness from consuming undercooked foods, like poultry and shellfish.²⁰ Thus, state advisories regarding cancer, mercury or other developmental and reproductive toxins may not be protected by these limited exceptions.

²⁰ Sec. 2, H.R. 4167 (establishing a new section 403B(g) of the FFDCa).